

LEGISLATIVE COUNSEL
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Calendar No. 959

96TH CONGRESS
2D SESSION

S. 1790

[Report No. 96-874]

Entitled the "Privacy Protection Act of 1979".

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 21 (legislative day, JUNE 21), 1979

By Mr. BAYH (for himself and Mr. BAUCUS) introduced the following bill; which
was read twice and referred to the Committee on the Judiciary

JULY 28 (legislative day, JUNE 12), 1980

Reported by Mr. BAYH, with an amendment and an amendment to the title

A BILL

Entitled the "Privacy Protection Act of 1979".

- 1 *Be it enacted by the Senate and House of Representa-*
- 2 *tives of the United States of America in Congress assembled,*
- 3 *That this Act may be cited as the "Privacy Protection Act of*
- 4 *1979".*

(1) there is probable cause to believe that the person possessing the materials has committed or is committing the criminal offense for which the materials are sought: *Provided, however,* That a government officer or employee may not search for or seize materials described in subsection 101(a) under the provisions of this paragraph if the offense for which the materials are sought consists of the receipt, possession, communication, or withholding of such materials or the information contained therein (but such a search or seizure may be conducted under the provisions of this paragraph if the offense consists of the receipt, possession,

1 or communication of information relating to the nation-
2 al defense, classified information, or restricted data
3 under 18 U.S.C. 793, 18 U.S.C. 794, 18 U.S.C. 797,
4 18 U.S.C. 798, 42 U.S.C. 2274, 42 U.S.C. 2275, 42
5 U.S.C. 2277, or 50 U.S.C. 783); or

6 (2) there is reason to believe that the immediate
7 seizure of the materials is necessary to prevent the
8 death of or serious bodily injury to a human being.

9 (b) Notwithstanding any other law, it shall be unlawful
10 for a government officer or employee, in connection with the
11 investigation or prosecution of a criminal offense, to search
12 for or seize documentary materials, other than work product,
13 possessed by a person in connection with a purpose to dis-
14 seminate to the public a newspaper, book, broadcast, or other
15 similar form of public communication, in or affecting inter-
16 state or foreign commerce; but this provision shall not impair
17 or affect the ability of any government officer or employee,
18 pursuant to otherwise applicable law, to search for or seize
19 such materials, if—

20 (1) there is probable cause to believe that the
21 person possessing the materials has committed or is
22 committing the criminal offense for which the materials
23 are sought: *Provided, however,* That a government offi-
24 cer or employee may not search for or seize materials
25 described in subsection 101(b) under the provisions of

1 this paragraph if the offense for which the materials
2 are sought consists of the receipt, possession, commu-
3 nication, or withholding of such materials or the infor-
4 mation contained therein (but such a search or seizure
5 may be conducted under the provisions of this para-
6 graph if the offense consists of the receipt, possession,
7 or communication of information relating to the nation-
8 al defense, classified information, or restricted data
9 under 18 U.S.C. 793, 18 U.S.C. 794, 18 U.S.C. 797,
10 18 U.S.C. 798, 42 U.S.C. 2274, 42 U.S.C. 2275, 42
11 U.S.C. 2277, or 50 U.S.C. 783); or

12 (2) there is reason to believe that the immediate
13 seizure of the materials is necessary to prevent the
14 death of or serious bodily injury to a human being; or

15 (3) there is reason to believe that the giving of
16 notice pursuant to a subpoena duces tecum would result
17 in the destruction, alteration, or concealment of the
18 materials; or

19 (4) the materials have not been produced in re-
20 sponse to a court order directing compliance with a
21 subpena duces tecum; and

22 (A) all appellate remedies have been ex-
23 hausted; or

24 (B) there is reason to believe that the delay
25 in an investigation or trial occasioned by further

1 proceedings relating to the subpoena would threat-
2 en the interest of justice. In the event a search
3 warrant is sought pursuant to this subparagraph,
4 the person possessing the materials shall be af-
5 forded adequate opportunity to submit an affidavit
6 setting forth the basis for any contention that the
7 materials sought are not subject to seizure.

8 **TITLE II—CONFIDENTIAL INFORMATION**
9 **PROTECTION**

10 SEC. 201. (a) Notwithstanding any other law it shall be
11 unlawful for a governmental officer or employee, in connec-
12 tion with the investigation or prosecution of a criminal of-
13 fense, to search for or seize any documentary material or
14 work product that would be considered by the jurisdiction of
15 the person in possession of the materials to be privileged ma-
16 terial under that jurisdiction's statutory or case law. This
17 provision shall not impair or affect the ability of any govern-
18 mental officer or employee pursuant to otherwise applicable
19 law to search for or seize materials if—

20 (1) there is probable cause to believe that the
21 person possessing the materials has committed or is
22 committing the criminal offense for which the materials
23 are sought; or

1 (2) there is reason to believe that the immediate
2 seizure of the materials is necessary to prevent the
3 death of or serious bodily injury to a human being; or

4 (3) there is reason to believe that the giving of
5 notice pursuant to a subpoena duces tecum would result
6 in the destruction, alteration, or concealment of materi-
7 als; or

8 (4) the materials have not been produced in re-
9 sponse to a court order directing compliance with a
10 subpoena duces tecum; and

11 (A) all appellate remedies have been ex-
12 hausted; or

13 (B) there is reason to believe that the delay
14 in an investigation or trial occasioned by further
15 proceedings relating to the subpoena would threat-
16 en the interests of justice. In the event a search
17 warrant is sought pursuant to this subparagraph,
18 the person possessing the materials shall be af-
19 forded adequate opportunity to submit an affidavit
20 setting forth the basis for any contention that the
21 materials sought are not subject to seizure.

22 TITLE III—CITIZENS PRIVACY PROTECTION

23 SEC. 301. (a) Notwithstanding any other law, it shall be
24 unlawful for a government officer or employee, in connection
25 with the investigation or prosecution of a criminal offense, to

1 search for or seize any documentary or work product materi-
2 als possessed by any person; but this provision shall not
3 impair or affect the ability of any government officer or em-
4 ployee, pursuant to otherwise applicable law, to search for or
5 seize such materials, if—

6 (1) there is probable cause to believe that the
7 person possessing the materials has committed or is
8 committing the criminal offense for which the materials
9 are sought; or

10 (2) there is reason to believe that the immediate
11 seizure of the materials is necessary to prevent the
12 death of or serious bodily injury to a human being; or

13 (3) there is reason to believe that the giving of
14 notice pursuant to a subpoena duces tecum would result
15 in the destruction, alteration, or concealment of the
16 materials; or

17 (4) the materials have not been produced in re-
18 sponse to a court order directing compliance with a
19 subpoena duces tecum; and

20 (A) all appellate remedies have been ex-
21 hausted; or

22 (B) there is reason to believe that the delay
23 in an investigation or trial occasioned by further
24 proceedings relating to the subpoena would threat-
25 en the interests of justice. In the event a search

1 warrant is sought pursuant to this subparagraph,
2 the person possessing the materials shall be af-
3 farded adequate opportunity to submit an affidavit
4 setting forth the basis for any contention that the
5 materials sought are not subject to seizure.

6 TITLE IV—REMEDIES, EXCEPTIONS, AND
7 DEFINITIONS

8 SEC. 401. This Act shall not impair or affect the ability
9 of a government officer or employee, pursuant to otherwise
10 applicable law, to conduct searches and seizures at the bor-
11 ders of or at international points of entry into the United
12 States in order to enforce the customs laws of the United
13 States.

14 SEC. 402. (a) A person aggrieved by a search for or
15 seizure of materials in violation of this Act shall have a civil
16 cause of action for damages for such search or seizure—

17 (1) against the United States, against a State
18 which has waived its sovereign immunity under the
19 Constitution to a claim for damages resulting from a
20 violation of this Act, or against any other governmen-
21 tal unit, all of which shall be liable for violations of
22 this Act by their officers or employees while acting
23 within the scope or under color of their office or em-
24 ployment; and

1 (2) against an officer or employee of a State who
2 has violated this Act while acting within the scope or
3 under color of his office or employment, if such State
4 has not waived its sovereign immunity as provided in
5 paragraph (1). It shall be a complete defense to a civil
6 action brought under this paragraph that the officer or
7 employee had a reasonable good faith belief in the law-
8 fulness of his conduct.

9 (b) The United States, a State, or any other government-
10 tal unit, liable for violations of this Act under paragraph
11 402(a)(1), may not assert as a defense to a claim arising
12 under this Act the immunity of the officer or employee whose
13 violation is complained of or his reasonable good faith belief
14 in the lawfulness of his conduct, except that such a defense
15 may be asserted if the violation complained of is that of a
16 judicial officer.

17 (c) The remedy provided by paragraph 402(a)(1) against
18 the United States, a State, or any other governmental unit is
19 exclusive of any other civil action or proceeding for conduct
20 constituting a violation of this Act, against the officer or em-
21 ployee whose violation gave rise to the claim, or against the
22 estate of such officer or employee.

23 (d) A person having a cause of action under this section
24 shall be entitled to recover actual damages but not less than
25 liquidated damages of \$1,000, such punitive damages as may

1 be warranted, and such reasonable attorneys' fees and other
2 litigation costs reasonably incurred as the court, in its discre-
3 tion, may award: *Provided, however,* That the United States,
4 a State, or any other governmental unit shall not be liable for
5 interest prior to judgment.

6 (e) The Attorney General may settle a claim for dam-
7 ages brought against the United States under this section,
8 and shall promulgate regulations to provide for the com-
9 mencement of an administrative inquiry following a determi-
10 nation of a violation of this Act by an officer or employee of
11 the United States and for the imposition of administrative
12 sanctions against such officer or employee if warranted.

13 (f) The district courts shall have original jurisdiction of
14 all civil actions arising under this section.

15 SEC. 403. (a) "Documentary materials", as used in this
16 Act, means materials upon which information is recorded,
17 and includes, but is not limited to, written or printed materi-
18 als, photographs, tapes, videotapes, negatives, films, out-
19 takes, and interview files.

20 (b) "Work product", as used in this Act, means the
21 matter representing the work done by a person in possession
22 of such material, as if the work was done by an attorney in
23 the course of an attorney-client relationship, except such
24 work product as constitutes contraband or the fruits of instru-
25 mentalities of a crime. For the purposes of title I of this Act,

1 "work product" means any documentary materials created
2 by or for a person in connection with his plans, or the plans
3 of the person creating such materials to communicate to the
4 public.

5 (c) "Any other governmental unit", as used in this Act,
6 includes the District of Columbia, the Commonwealth of
7 Puerto Rico, any territory or possession of the United States,
8 and any local government, unit of local government, or any
9 unit of State government.

10 *That this Act may be cited as the "Privacy Protection Act of*
11 *1980".*

12 *TITLE I—FIRST AMENDMENT PRIVACY*
13 *. PROTECTION*

14 *PART A—UNLAWFUL ACTS*

15 *SEC. 101. (a) Notwithstanding any other law, it shall*
16 *be unlawful for a government officer or employee, in connec-*
17 *tion with the investigation or prosecution of a criminal of-*
18 *fense, to search for or seize any work product materials pos-*
19 *sessed by a person reasonably believed to have a purpose to*
20 *disseminate to the public a newspaper, book, broadcast, or*
21 *other similar form of public communication, in or affecting*
22 *interstate or foreign commerce; but this provision shall not*
23 *impair or affect the ability of any government officer or em-*
24 *ployee, pursuant to otherwise applicable law, to search for or*
25 *seize such materials, if—*

1 (1) there is probable cause to believe that the
2 person possessing such materials has committed or is
3 committing the criminal offense for which such materi-
4 als are sought: Provided, however, That a government
5 officer or employee may not search for or seize such
6 materials under the provisions of this paragraph if the
7 offense for which such materials are sought consists of
8 the receipt, possession, communication, or withholding
9 of such materials or the information contained therein
10 (but such a search or seizure may be conducted under
11 the provisions of this paragraph if the offense consists
12 of the receipt, possession, or communication of infor-
13 mation relating to the national defense, classified infor-
14 mation, or restricted data under the provisions of sec-
15 tion 793, 794, 797, or 798 of title 18, United States
16 Code, or section 224, 225, or 227 of the Atomic
17 Energy Act of 1954 (42 U.S.C. 2274, 2275, 2277),
18 or section 4 of the Subversive Activities Control Act of
19 1950 (50 U.S.C. 783)); or

20 (2) there is reason to believe that the immediate
21 seizure of such materials is necessary to prevent the
22 death of, or serious bodily injury to, a human being.

23 (b) Notwithstanding any other law, it shall be unlawful
24 for a government officer or employee, in connection with the
25 investigation or prosecution of a criminal offense, to search

1 *for or seize documentary materials, other than work product*
2 *materials, possessed by a person in connection with a purpose*
3 *to disseminate to the public a newspaper, book, broadcast, or*
4 *other similar form of public communication, in or affecting*
5 *interstate or foreign commerce; but this provision shall not*
6 *impair or affect the ability of any government officer or em-*
7 *ployee, pursuant to otherwise applicable law, to search for or*
8 *seize such materials, if—*

9 *(1) there is probable cause to believe that the*
10 *person possessing such materials has committed or is*
11 *committing the criminal offense for which such materi-*
12 *als are sought: Provided, however, That a government*
13 *officer or employee may not search for or seize such*
14 *materials under the provisions of this paragraph if the*
15 *offense for which such materials are sought consists of*
16 *the receipt, possession, communication, or withholding*
17 *of such materials or the information contained therein*
18 *(but such a search or seizure may be conducted under*
19 *the provisions of this paragraph if the offense consists*
20 *of the receipt, possession, or communication of infor-*
21 *mation relating to the national defense, classified infor-*
22 *mation, or restricted data under the provisions of sec-*
23 *tion 793, 794, 797, or 798 of title 18, United States*
24 *Code, or section 224, 225, or 227 of the Atomic*
25 *Energy Act of 1954 (42 U.S.C. 2274, 2275, 2277),*

1 or section 4 of the Subversive Activities Control Act of
2 1950 (50 U.S.C. 783));

3 (2) there is reason to believe that the immediate
4 seizure of such materials is necessary to prevent the
5 death of, or serious bodily injury to, a human being;

6 (3) there is reason to believe that the giving of
7 notice pursuant to a subpoena duces tecum would result
8 in the destruction, alteration, or concealment of such
9 materials; or

10 (4) such materials have not been produced in re-
11 sponse to a court order directing compliance with a
12 subpoena duces tecum, and—

13 (A) all appellate remedies have been exhaust-
14 ed; or

15 (B) there is reason to believe that the delay
16 in an investigation or trial occasioned by further
17 proceedings relating to the subpoena would threaten
18 the interests of justice.

19 (c) In the event a search warrant is sought pursuant to
20 paragraph (4)(B) of subsection (b), the person possessing the
21 materials shall be afforded adequate opportunity to submit an
22 affidavit setting forth the basis for any contention that the
23 materials sought are not subject to seizure.

1 *PART B—REMEDIES, EXCEPTIONS, AND DEFINITIONS*

2 *SEC. 105. This Act shall not impair or affect the ability*
3 *of a government officer or employee, pursuant to otherwise*
4 *applicable law, to conduct searches and seizures at the bor-*
5 *ders of, or at international points of, entry into the United*
6 *States in order to enforce the customs laws of the United*
7 *States.*

8 *SEC. 106. (a) A person aggrieved by a search for or*
9 *seizure of materials in violation of this Act shall have a civil*
10 *cause of action for damages for such search or seizure—*

11 *(1) against the United States, against a State*
12 *which has waived its sovereign immunity under the*
13 *Constitution to a claim for damages resulting from a*
14 *violation of this Act, or against any other governmental*
15 *unit, all of which shall be liable for violations of this*
16 *Act by their officers or employees while acting within*
17 *the scope or under color of their office or employment;*
18 *and*

19 *(2) against an officer or employee of a State who*
20 *has violated this Act while acting within the scope or*
21 *under color of his office or employment, if such State*
22 *has not waived its sovereign immunity as provided in*
23 *paragraph (1).*

24 *(b) It shall be a complete defense to a civil action*
25 *brought under paragraph (2) of subsection (a) that the officer*

1 or employee had a reasonable good faith belief in the lawful-
2 ness of his conduct.

3 (c) The United States, a State, or any other governmen-
4 tal unit liable for violations of this Act under subsection
5 (a)(1), may not assert as a defense to a claim arising under
6 this Act the immunity of the officer or employee whose viola-
7 tion is complained of or his reasonable good faith belief in the
8 lawfulness of his conduct, except that such a defense may be
9 asserted if the violation complained of is that of a judicial
10 officer.

11 (d) The remedy provided by subsection (a)(1) against
12 the United States, a State, or any other governmental unit is
13 exclusive of any other civil action or proceeding for conduct
14 constituting a violation of this Act, against the officer or em-
15 ployee whose violation gave rise to the claim, or against the
16 estate of such officer or employee.

17 (e) Evidence otherwise admissible in a proceeding shall
18 not be excluded on the basis of a violation of this Act.

19 (f) A person having a cause of action under this section
20 shall be entitled to recover actual damages but not less than
21 liquidated damages of \$1,000, such punitive damages as may
22 be warranted, and such reasonable attorneys' fees and other
23 litigation costs reasonably incurred as the court, in its discre-
24 tion, may award: Provided, however, That the United States,

1 a State, or any other governmental unit shall not be liable for
2 interest prior to judgment.

3 (g) The Attorney General may settle a claim for dam-
4 ages brought against the United States under this section,
5 and shall promulgate regulations to provide for the com-
6 mencement of an administrative inquiry following a determi-
7 nation of a violation of this Act by an officer or employee of
8 the United States and for the imposition of administrative
9 sanctions against such officer or employee, if warranted.

10 (h) The district courts shall have original jurisdiction of
11 all civil actions arising under this section.

12 SEC. 107. (a) "Documentary materials", as used in
13 this Act, means materials upon which information is re-
14 corded, and includes, but is not limited to, written or printed
15 materials, photographs, tapes, videotapes, negatives, films,
16 out-takes, and interview files, but does not include contra-
17 band or the fruits of a crime or things otherwise criminally
18 possessed, or property designed or intended for use, or which
19 is or has been used as, the means of committing a criminal
20 offense.

21 (b) "Work product materials", as used in this Act,
22 means materials, other than contraband or the fruits of a
23 crime or things otherwise criminally possessed, or property
24 designed or intended for use, or which is or has been used, as
25 the means of committing a criminal offense, and—

1 (1) in anticipation of communicating such materi-
2 als to the public, are prepared, produced, authored, or
3 created, whether by the person in possession of the ma-
4 terials or by a person other than the person in posses-
5 sion of the materials;

6 (2) are possessed for the purposes of communicat-
7 ing such materials to the public; and

8 (3) include mental impressions, conclusions, opin-
9 ions, or theories of the person who prepared, produced,
10 authored, or created such material.

11 (c) "Any other governmental unit", as used in this Act,
12 includes the District of Columbia, the Commonwealth of
13 Puerto Rico, any territory or possession of the United States,
14 and any local government, unit of local government, or any
15 unit of State government.

16 SEC. 108. The provisions of this title shall become ef-
17 fective on October 1, 1980, except that insofar as such provi-
18 sions are applicable to a State or any governmental unit
19 other than the United States, the provisions of this title shall
20 become effective one year from the date of enactment of this
21 Act.

22 TITLE II—ATTORNEY GENERAL GUIDELINES

23 SEC. 201. (a) The Attorney General shall, within six
24 months of the date of enactment of this Act, issue guidelines
25 for the procedures to be employed by any Federal officer or

1 *employee, in connection with the investigation or prosecution*
2 *of a criminal offense, to obtain documentary materials in the*
3 *private possession of a person when the person is not reason-*
4 *ably believed to be a suspect in such offense or related by*
5 *blood or marriage to such a suspect, and when the materials*
6 *are sought are not contraband or the fruits or instrumental-*
7 *ities of an offense. The Attorney General shall incorporate in*
8 *such guidelines—*

9 (1) *a recognition of the personal privacy interests*
10 *of the person in possession of such documentary*
11 *materials;*

12 (2) *a requirement that the least intrusive method*
13 *or means of obtaining such materials be used which do*
14 *not substantially jeopardize the availability or useful-*
15 *ness of the materials sought to be obtained; and*

16 (3) *a recognition of special concern for privacy in-*
17 *terests in cases in which a search or seizure for such*
18 *documents would intrude upon a known confidential*
19 *relationship.*

20 (b) *The Attorney General shall collect and compile in-*
21 *formation on, and report annually to the Committees on the*
22 *Judiciary of the Senate and the House of Representatives on,*
23 *the use of search warrants by Federal officers or employees*
24 *for documentary materials described in subsection (a)(3).*

1 (c) *An issue relating to the compliance, or to the failure*
2 *to comply, with guidelines issued pursuant to this section*
3 *may not be litigated, and a court may not entertain such an*
4 *issue as a basis for the suppression or exclusion of evidence.*

Amend the title so as to read: "A bill entitled the 'Privacy Protection Act of 1980'".

Calendar No. 959

96TH CONGRESS
2D Session

S. 1790

[Report No. 96-874]

A BILL

Entitled the "Privacy Protection Act of 1979".

SEPTEMBER 21 (legislative day, JUNE 21), 1979

Read twice and referred to the Committee on the Judiciary

JULY 28 (legislative day, JUNE 12), 1980

Reported with an amendment and an amendment to the title